No. 83-1341

IN THE

Supreme Court of the United States

October Term, 1983

WESTERN COAL TRAFFIC LEAGUE, ET. AL.,

Petitioners,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

Respondents,

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This brief in support of the Petition for Writ of Certiorari is submitted by Russell Long, Lloyd Bentsen, Nick Joe Rahall, Tom Loeffler, Jack Brooks, J.J. Pickle, Sam B. Hall, Michael A. Andrews, Bill Patman, and Alan Mollohan.

Letters showing the consent of all the parties for amici to file this brief have been filed with the clerk.

The amici are all members of the United States Congress and most of them were in the 96th Congress when the Staggers Rail Act was passed in 1980. Amicus Nick Rahall was co-author[1] of the amendment to the Staggers Act which established jurisdictional standards, and which continued

[1]With the Chairman of the House Interstate and Foreign Commerce Committee, Harley Staggers.

the existing definition of "market dominance" of the 4-R Act as a jurisdictional standard in the Interstate Commerce Act which is the law today.

The central question at issue in this case is:

> Whether the ICC may consider evidence of product and geographic competition in determining the threshold requirement of "market dominance" essential to its jurisdiction to consider the reasonableness of rail rates.

If the Court is to reach this question, a barrier which the Fifth Circuit Court raised must be surmounted:

> Whether Congress left the resolution of the central question for the exclusive determination of the ICC; or, on the other hand, whether a court must construe the meaning of the statutory language defining "market dominance".

We will argue that the central question must be answered in the negative and that a court must decide such question.

ARGUMENT

THE COMMISSION MAY NOT, BY ESTABLISHING ITS OWN DEFINITION OF "MARKET DOMINANCE", RELIEVE ITSELF OF ITS STATUTORY DUTY TO REGULATE RAILROAD RATES WHEN EFFECTIVE COMPETITION DOES NOT EXIST FOR THE TRAFFIC OR MOVEMENT FROM THE PLACE OF ORIGIN TO THE PLACE OF DESTINATION.

I

THIS CONCEPT IS EXPLICIT IN THE

LANGUAGE OF THE 4-R ACT AND IN ITS INTERPRETATION IN EX PARTE NO. 320.

A. Where there is only competition from another geographic location or competition from another product not the subject of the issue traffic, such is not "effective competition" by a *carrier* for that transportation *to which the rate applies.*

"Market dominance," as it appears in the statute, relates only to the traffic or movement involved, not to all possibilities of competition for the shipper's custom or trade, and the Commission recognized this. In a proceeding held under the temporary mandate of the statutory directive of § 1(5) (d), it found "that the appropriate market is the market for transportation services which directly compete with service outlined in the tariff under consideration," and that this interpretation is "consistent with the express language of the legislative definition."[2]

The Commission went on to address the contrary interpretation advanced by the railroads, stating:

> The contention of some of the parties that use of the word "traffic" in conjunction with the word "movement" requires consideration of a broad range of movements of various commodities moving from various sources to various destinations must be rejected. The 4R Act speaks of "the traffic or movement to which the rate applies." When used in this context in the transportation industry, the word

[2]Ex Parte No. 320 (interim report), 353 ICC 875 at 904. Ex Parte No. 320 was decided at the only time that the ICC had congressionally delegated authority to provide standards and procedures for determining whether and when a railroad possesses "market dominance".

> "movement" refers to transportation from a single origin point to a single destination point, while the word "traffic" commonly denotes transportation services from a named set of points to another point or set of points; from specific origin points or areas to rate groups or blanket areas; or between stated mileage (on particular commodities) in a given territory.[3]

From the language quoted above it is apparent that the Commission was not merely choosing to accept jurisdiction within a range of permissive authority in which it could eschew jurisdiction. It was accepting the proposition that, within the constraints of the language of the statute, it could not eschew jurisdiction on the basis of the existence of geographic or product competition.[4]

When the ICC purported to alter its contemporaneous interpretation of "market dominance" by redefining "effective competition" to include "geographic" and "product" competition,[5] it did not just develop "standards and procedures" *for determining* "whether and when a [railroad] possesses market dominance"; it adopted, contrary to the mandate of the specific language of the Act and to the import of its legislative history, a new and different definition of "market dominance".

The majority on the three judge panel that first decided this case[6] correctly held that the jurisdictional question of "market dominance" was determined by the statutory language of Sec. 202(b) of the 4-R Act, which amended 49 U.S.C. § 1(5) by adding a new subsection (c). That subsection, in pertinent part, reads:

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[3] *Id.*, at 904, last paragraph.

[4] It found such construction "*essential* to making practical determinations in a short time period" and § 1(5) (d) directed that it make "a practical determination without administrative delay.." *Id.*, at 904.

[5] In Ex Parte No. 320 (Sub-No. 2), 365 ICC 118, July 8, 1981.

[6] *Western Coal Traffic League v. U.S.* 694 F.2d 378 (5th Cir. 1982), *rev'd en banc* 719 F.2d 772 (5th Cir. 1983) (hereinafter WCTL).

> "market dominance" refers to an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies . . .

The panel court found the answer to the question of *what competition is involved* in the language of the statute itself. It is the competition from "other carriers or modes of transportation", not from other producers of substitute products (product competition). And it is "for the traffic or movement *to which the rate applies*", not for some other movement to which some other rate might be reasonable (geographic competition).

B. When it decided Ex Parte No. 320 (Sub-No. 2) the Commission had no authority to define market dominance.

1. *The authority of 49 U.S.C. § 1(5)(d) was limited to the time of the initial setting up of a program under the 4-R Act.*

For a period of time after the passage of a statute which establishes new concepts of law, it is not uncommon for Congress to recognize the need of the agency administering the statute to "set up housekeeping" under the new law and to grant temporary authority to the agency to establish the rules and procedures necessary to set the program afoot.

Consonant with this, subsection (b) of §202 added §1(5)(d) to Title 49, authorizing the agency to establish *procedures* for determining the *application* of jurisdictional yardsticks during this inauguration period.

The Fifth Circuit Court said: "Congress not only expected but required the ICC to undertake the task of developing 'standards and procedures' for determining 'whether and when a [railroad] possesses market

dominance.' "[7] The court then erroneously assumed that this language permits the establishment of standards which would ignore the fact that the competition involved is limited to *carrier* competition for only "the traffic or movement *to which the rate applies*" by the terms of the statute itself.[8] The standards and procedures contemplated were merely those appropriate for administering the statutory mandate. The Commission was not empowered to enlarge or diminish it in a substantive manner. This point will be considered in greater detail in C, *infra.*

But even if we should assume, for the sake of argument, that the temporary delegation granted under §1(5) (d) gave the ICC, *in the initial period* of establishing its program under the new Act, authority to affect the scope of its own jurisdiction by an enlargement of the concept of competition, the ICC *did not* attempt this during the 240 days while §1(5) (d) was in effect. Obedient to the statute, it found the competition which defeats market dominance to be that which directly competes "with service outlined in the tariff under consideration."[9]

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[7]*See* the court's decision at p. 778. The pertinent statutory language, set forth in the 4-R Act, § 202(b), codified at 49 U.S.C. § (5) (d) (1976), repealed by Pub.L. No. 95-473, § 4(b), (c), 92 Stat. 1337, 1466-70 (1978), was:

> Within 240 days after the date of the enactment of this subdivision, the Commission shall establish, by rule, standards and procedures for determining in accordance with Section 15(9) of this part, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay.

[8]*WCTL,* 719 F.2d at 776.

[9]Ex Parte No. 320 (Interim Report), 353 ICC at 904.

If the construction of the term "effective competition" were not fixed and certain before the Commission acted in Ex Parte No. 320, it became so at that time. Congress appeared to be satisfied with the result, or it would not have approved the codification interpreted by the "standards and procedures" adopted in Ex Parte No. 320. Had it been dissatisfied, it most likely would not have repealed §1(5)(d) but would have enlarged the time during which the Commission could act under it.

> 2. *When the ICC promulgated Ex Parte No. 320 (Sub-No. 2) it had no authority under §1(5)(d), and its general rule making authority did not direct or permit a new and different construction of "market dominance".*

After 240 days, §1(5)(d) ceased to have effect. Therefore, at the time the ICC adopted Ex Parte No. 320 (Sub-No. 2), its authority stemmed solely from its general rule-making authority under 49 U.S.C. §10321(a). The extent of that authority is elucidated in *Global Van Lines v. ICC*, 714 F.2d 1290 (5th Cir. 1983) wherein the Court considers in depth this general rule-making authority and its sources and concludes:

> . . .the general rulemaking provision imparts power to the ICC only to enforce and carry out the specific substantive mandates enacted by Congress.[10]

Such general rule-making authority could not be used to justify defining *carrier* competition "for the traffic or movement *to which the rate applies*" to mean competition *with* that movement by *another* movement, or competition

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[10] *Global Van Lines v. ICC*, 714 F.2d at 1295.

by *other than a carrier.* Suppliers of some other product (than that transported) at the point of destination are "not carriers." If they may be said to offer competition it is not through competing "modes of transportation", which is the only kind of competition the statute refers to.

To read the statutory language otherwise would not be to enforce or carry out "specific substantive mandates enacted by Congress." Rather, it would be to alter or at least give a very much broader meaning to "competition" than the statutory language spontaneously yields.

The extremely important point that cannot be overemphasized is that Ex Parte No. 320 was of an entirely different *genre* than Ex Parte No. 320 (Sub-No. 2) It was an act of the Commission mandated by Congress to promptly lay out ground rules that would give certainty to the Commission's jurisdictional scope.[11] In promulgating Ex Parte No. 320, the Commission was acting in behalf of Congress in a way that it could never act again after the 240 day period. The authority of § 1(5)(d) was expressly allowed, and the time delimited, for settling questions of interpretation, so that the statutory mandates would become fixed and permanent until Congress should itself alter them.

The ICC did not envisage its authority under §1(5)(d) as permitting the filling in of the interstices of the statutory language but rather as calling for illuminating its specific terms. Viewing its mission in this light, the Commission said:

> There is no language in the legislation which would warrant the extension of the phrase "the

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[11]This is shown in its title: *Special Procedures for Making Findings of Market Dominance as Required by the Railroad Revitalization and Regulatory Reform Act of 1976.*

> traffic or movement to which the rate applies" beyond transportation services which are comparable to that described in the issue tariff.[12]

When Congress codified the terms so interpreted in the Interstate Commerce Act in 1978, this interpretation of "market dominance" was accepted by Congress. Since the interpretation had the sanction of the specific statutory authority of § 1 (5)(d), it became a part of the law when that authority ceased, and the ICC could not change the settled law under the limited general rule-making authority of § 10321(a).[13]

The Appeals Court never recognizes in the body of the opinion (though it recognized repeal of § 1(5)(d) at n. 7, p. 776) that the ICC could no longer rely on that section's authority when it promulgated Ex Parte No. 320 (Sub-No. 2). At such time the only authority available for rule-making was § 10321(a) which contained no specific mandate directing the Commission to further construe "market dominance".

C. The court erred in determining that it was without authority to independently construe "market dominance".

The ICC takes the position that, by construing from time to time "effective competition", it can *alter* its mandate to require just and reasonable rates where a railroad has

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[12]Ex Parte No. 320 (Interim Report) 353 ICC at 905.

[13]The *en banc* Court's decision quotes *American Trucking Association v. A T & SF Ry. Co.*, 387 U.S. 397 (1967) for the proposition that agencies "are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." But the Court does not quote the condition placed upon exercise of this flexibility which appears in the preceding sentence: that such changes be "within the limits of the law."

market dominance. The appeals court upheld this position on ground of the Commission's superior expertise, saying that such construction of statutory language may not be judicially reviewed, even though "the members of the Court might have construed the statute differently."[14]

Section 1(5)(d) had given the Commission authority to establish standards and procedures to carry out the mandate of the 4-R Act (though not to alter that mandate) but, as we have seen, that authority had expired. Thus, *Batterton v. Francis*, 432 U.S. 416 (1977), relied on by the *en banc* court, is inapposite. In *Batterton v. Francis* the agency was *directed* to define the term "unemployment".[15] If the ICC were ever directed to define "market dominance" as a jurisdictional base, that time had long since passed.

The principle applicable to the instant case is ably spelled out in *Rowan Companies, Inc. v. United States*, 452 U.S. 247 (1981), a case involving a challenge to Internal Revenue Service regulations interpreting the word "wages" for social security and unemployment tax purposes. The Court noted that since Congress itself had defined wages, less deference was due the IRS interpretation than where the agency acted under specific grant of authority to define a statutory term. (452 U.S. at 253.)

The Court went on to observe that later interpretations are entitled to less weight than a contemporaneous interpretation, and that "the consistency of the

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[14] *WCTL*, 719 F.2d at 777.

[15] Likewise, in *Aberdeen & Rockfish R. Co. v. United States*, 682 F.2d 1092 (5th Cir. 1982), also relied on by the *en banc* Court, the agency action was clearly within the ordinary authority of the agency. Insofar as its dictum tources on the issue here, the court supported *judicial* authority to construe a statute's jurisdictional language, saying: "Statutory construction normally raised only questions of law, which are freely reviewable *de novo* by the Courts."

Commission's intrepretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute" are also pertinent. (*Id.*, quoting *National Muffler Dealers Assn. v. United States*, 440 U.S. 472, 477 (1979).) *Batterton* was distinguished.

Here, as in *Rowan Companies, Inc.*, Congress itself defined the controlling term—"market dominance". What is more, Congress repealed the Commission's express authority to promulgate standards and procedures for determining market dominance in 1978, and, as will be shown below, the Commission's original market dominance regulations were very much a matter of Congressional concern when Congress enacted the Staggers Rail Act of 1980. The court of appeals nevertheless felt compelled to defer to the Commission's non-contemporaneous, inconsistent redefinition of market dominance in the 1981 proceeding. To the extent that *Batterton v. Francis* is relevant here, it supports deference to the Commission's original market dominance rules under the 4-R Act, and *not* to its later decision to include product and geographic competition.

The Fifth Circuit strayed even further from established law relating to deference to administrative action than did the District of Columbia Circuit in *Volkswagenwerk Aktiengesellschaff v. Federal Maritime Commission*, 390 U.S. 261 (1968). The Court of Appeals for the District of Columbia Circuit had affirmed the holding of the Commission, feeling itself confined to determining only whether the Commission's ruling was supported by "substantial evidence." In the instant case the "arbitrary and capricious" standard was invoked.[16] Thus the case was decided on even more restrictive grounds than those employed in *Volkswagenwerk*.

[16] *See WCTL* 719 F.2d at p. 777.

The Supreme Court reversed the D.C. Circuit on the basis that "the issue relates not to the sufficiency of the evidence but to the construction of a statute," saying that "the courts are the final authorities on issues of statutory construction." (390 U.S. at 272.) The Court went on to state that courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." (*Id.*, quoting *N.L.R.B. v. Brown*, 380 U.S. 278, 291 (1965).) *See also Bureau of Alcohol, Tobacco and Firearms v. F.L.R.A.*, ____ U.S. ____, 104 S.Ct. 439, 444, n. 8 (1983); *Public Service Commission v. FPC*, 511 F.2d 338, 354 (D.C. Cir. 1975).

The question in the instant case is, of course, one of where Congress reposed the power, but the purpose of Congress must be reasonably interpreted. It must be assumed, if the language of the statute is not clear, that Congress intended to leave the power to the courts to determine matters of policy determination or of the jurisdiction of the agency. Thus Kenneth Culp Davis states in 4 *Administrative Law Treatise* 113, §28.21:

> "Completely cutting off what the courts have to offer to a governmental program may violate the cardinal principle that functions should be allocated between courts and agencies on the basis of comparative qualifications of each tribunal. The judges are specialists in constitutional issues, many aspects of statutory interpretation, in the limits of fair procedure, and in assuring that findings are supported by substantial evidence."

The *en banc* decision would have relegated to the court only the last item.

The issues here involve broad questions of Congressional intent, not narrow technical administrative detail, and courts brings unique expertise to such analyses. The court of appeals' extreme deference to the Commission deprived the public of the benefit of court review of a critical question of statutory construction and amounted to abdication of the court's responsibility.

II

THE STAGGERS ACT AND ITS LEGISLATIVE HISTORY SHOW THAT CONGRESS REJECTED A PROPOSED ALTERATION TO INCLUDE GEOGRAPHIC AND PRODUCT COMPETITION IN DETERMINING "MARKET DOMINANCE".

A. The "market dominance" threshold for ICC jurisdiction was considered fixed and definite, changeable only by statutory amendment, when Congress embarked on amending the Interstate Commerce Act in 1980.

All congressional action on the Staggers Act and immediately preceding it indicates that the meaning of the jurisdictional concept of "market dominance" was considered by Congress to be fixed and definite when the 96th Congress began to consider the matter at the commencement of the session in 1980. This was the position of those who wanted to change the law to permit consideration of product and geographic competition (whom we shall call the "railroad side") as well as those who opposed any such change (whom we shall call the "shipper side").

This unanimity in understanding the posture of "market dominance"at the commencement of the second session of

the 96th Congress was first reflected in 1980 in a report of the Subcommittee on Oversight and Investigations of the Interstate and Foreign Commerce Committee, which had concluded that—

> The Commission's decision in *Coleto Creek* [which considered product and geographic competition] represents a violation of the fundamental mandate of the 4-R Act and a dramatic departure from the ICC's own market dominance regulations and previous coal rate decisions.[17]

Republicans on the subcommittee, who supported the *policy* of freeing the ICC to adopt a broader concept of competition than that permitted in the last reasoned interpretation of the ICC (Ex Parte No. 320), nevertheless recognized that, in interpreting competition broadly enough to include product and geographic competition in the Coleto Creek case,[18] the ICC was "playing 'fast and loose' with the law." Thus, in the minority views,[19] it was

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[17] *Railroad Coal Rates and Public Participation: Oversight of ICC Decisionmaking.* Report by Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, House of Representatives, 96th Cong., 2nd Sess., Feb. 1980, Com. Print 96-IFC 40, p. 83.

[18] *Incentive Rates on Coal-Axial, Co, to Coleto Creek, TX,* Docket No. 37226 (Jan. 15, 1980).

[19] Separate views of the Honorable Norman F. Lent, ranking minority member of the Subcommittee, joined by James T. Broyhill, ranking minority member of the House Interstate and Foreign Commerce Committee, and Tom Corcoran and William E. Dannemeyer, constituting all the Republican members of the Subcommittee except Mathew J. Rinaldo, who concurred with many of the criticisms made by other members of the minority but did not sign because of his reluctance "to embrace the position of total rail deregulation."

said by these supporters of consideration of product and geographic competition:

> Overall, the report shows that the ICC has embarked on a policy of "deregulation by regulation." To recognize this does not mean that I disagree with what the ICC is doing. For instance, one can support the result of the *Coleto Creek* case while recognizing that the ICC is playing "fast and loose" with the law.
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> ***
>
> In summary, the report recommends that the *actual,* expressed policies of the 4-R Act be reaffirmed and enforced on the Commission. Put another way, the ICC would not only have to follow the *spirit* of the 4-R Act, it would have to follow the letter of it as well.[20]

When HR 7325, the administration bill, was introduced, the Department of Transportation and the administration appeared to have accepted the view that product competition and geographic competition could not be brought into play without legislative action, for the legislation as introduced would have amended the 4-R Act definition of market dominance by requiring the ICC to consider product and geographic competition.[21]

This legislation did not pass in its introduced form. It culminated in the Staggers Act which did not in any way alter the definition of the 4-R Act. All the floor action was consistent with a recognition that product and geographic

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[20]*Id.*, p. 137.

[21]*See* HR 7325, 96th Cong. 2nd Sess., § 202(c) and particularly (c)2(A)(ii) and (B).

competition were not to be considered in the determination of market dominance.[22]

B. The major dispute on the bill was settled by a compromise that fully retained the 4-R Act's concept of market dominance.

The most conclusive evidence in the legislative history, showing that all parties recognized that market dominance remained unaffected,[23] was the floor action on the Staggers-Rahall amendment. That amendment struck a compromise between the "railroad side" and the "shipper side" which became the pertinent part of the enacted bill relating to the ICC's jurisdiction.

The amendment made several changes. It abandoned the immediate application of the "cost recovery percentage" as a jurisdictional threshold. It accepted the Eckhardt-Rahall proposal presuming no market dominance for rates producing revenue to variable cost ratios less than 160 percent, but only through September 30, 1981; then that percentage was to move up in the steps of five percentage points at one year intervals to October 1, 1984. After October 1, 1984, the "cost recovery percentage" was to be used as the ICC's jurisdictional threshold with the qualification that it be not more than 180 percent nor less than 170 percent of variable cost.[24] This structure of rising jurisdictional thresholds was accepted by proponents of

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[22]For fuller treatment of legislative history and a fuller account of such floor action, *see* R. Eckhardt, Market Dominance in the Staggers Act, ICC Practitioners' Journal, Vol. 48, No. 6, p. 662, IV. Legislative History of Staggers Act, pp. 668-697.

[23]And thus was not affected by product or geographic competition.

[24]96th Cong., 2d Sess., 126 Cong. Rec. H 8341-51 (daily ed., Sept. 5, 1980).

product and geographic competition as a *substitute* for their expanded definition of market dominance.[25]

In the final resolution of the dispute, the House provided for consideration of product and geographic competition in only one way. Section 205 provided that the Commission should commence a proceeding for determining whether, and to what extent, geographic and product competition should be used in determining rate reasonableness.[26] But it expressly excluded consideration of geographic and product competition in defining the term "market dominance."[27]

All the language supportive of geographic or product competition as an element in determining market dominance remained stricken, and in the provisions codified as § 10709 of the Interstate Commerce Act, the 4-R Act definition remained the law.

Congressman Rahall, co-sponsor and most active proponent of the amendment, described the effect of the amendment as follows:

> This compromise amendment today is not undoing what the original Eckhardt-Rahall amendment accomplished...It will assure that the Interstate Commerce Commission does not proceed headlong into deregulation without

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[25] *Market Dominance in the Staggers Act* (referred to *supra* in fn. 30) p. 676: D. *Abandonment by Railroad Side of "Actual or Potential Transportation Alternative" Test.*

[26] *Id.*, pp. 679-681, V. *The Act as Passed and Its Meaning* and *see* particularly "2" on p. 680, "Inclusion in Reasonableness Section Implies Exclusion from Threshold Section."

[27] § 205 of Pub. L. 96-448, set forth in Historical Note to 49 U.S.C. § 10701a.

> guidelines and without a bill from the Congress...[28]

There is nothing in the record that indicates any contradiction of this assessment or any contrary viewpoint. The bill as so amended became law largely as it was thus formulated through this compromise in the House.

C. Ex Parte No. 320 (Sub-No. 2), if allowed to stand, would permit the "railroad side" to retain all the advantages they obtained in the compromise and take away, by an administrative return to the original committee bill, all the fruits of compromise gained by the "shipper side."

From what has gone before, it is clear that upon passage of the Staggers Act a clear message was sent by Congress to the Commission that Congress was not willing to change the definition of "market dominance" to include geographic and product competition. The Conference Committee Report reaffirmed that the "definition of market dominance under existing law [had] not been altered,[29] and all the court of appeals judges who participated in this case agreed that the 4-R Act is controlling. Thus "effective competition" must be considered as restricted under the 4-R Act to competition by *carriers* who are competing *for the traffic or movement involved.*

But Judge Brown, in his dissent on the panel, and Judge Johnson, in his opinion for the *en banc* majority, rely

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[28]96th Cong., 2d Sess., 126 Cong. Rec. H. 8551 (daily ed., Sept. 9, 1980). Mr. Rahall was at the time working for the compromise with Subcommittee Chairman Florio and Chairman Staggers and was in complete accord with them.

[29]H. Rep. No. 96-1430, 96th Cong. 2d Sess. 88-89 (1980) U.S. Code Cong. & Ad. News 1980, 4120.

heavily on suceeding language in the report, language which need not be considered as in conflict with any of the conclusions drawn here. Whatever narrow inferences may be drawn from the language of the report, the legislative history relating to what actually happened in the committees and subcommittees and on the floors of Congress is far more persuasive.[30]

Legislative history of the Staggers Act is relevant here to show what Congress envisaged as the result of an arduous undertaking in 1980 to reconcile differences between two large and important segments of the commercial society. Important concessions were made by both sides:

1. Shippers accepted the idea that one threshold test of ICC jurisdiction would be based on revenue to variable cost percentages, with the result that rates below the specified percentages would not be subject to ICC jurisdiction over rate reasonableness.
2. Railroads relinquished insistence on a "feasible transportation alternative" test incorporating the concept of product and geographic competition as a substitute for the 4-R Act's "market dominance" test, as the other threshold for ICC jurisdiction.

After these matters were settled in hard-fought legislative encounters, the ICC would upset the reasonable

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[30]This is particularly true when a conference is short, almost to the point of non-existence (as was the case here) and the draftsmen of the report are those who put the committee bill together and are likely to be inclined toward its form and intent before floor amendment. *See* R. Eckhardt, *The Western Coal Traffic League Case*, Transportation Law Journal, Vol. 13, No. 2 (1984) (in process of publication, page proof available at University of Denver School of Law). Note particularly "IV. THE CONFERENCE COMMITTEE REPORT, Weight and Credibility to Be Attributed to Report Language."

compromise that settled the major dispute between the vying sides, making the whole legislative process meaningless.

Shippers would be robbed of the fruits of their compromise. Railroads would retain their side of the bargain and would also get back what they had conceded in trade for it: agreement to retain the established 4-R Act conception of "market dominance."

CONCLUSION

Considering the importance of the issue and the fact that the meaning of "market dominance" has not been conclusively decided by any court, this Court should grant certiorari.

Respectfully submitted,

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